Guidance Note

For unregulated employers of Costs Lawyers

8 April 2024 (version 2)

Costs Lawyer Standards Board

Who is this guidance for?

1. You should read this guidance if you have responsibility for a business that:
   - employs Costs Lawyers or has officers (such as partners or directors) who are Costs Lawyers; and
   - is not authorised by a regulator (such as the Solicitors Regulation Authority) under the Legal Services Act 2007 (LSA).

   We refer to such businesses as "unregulated employers" because they are not regulated specifically under the LSA, although they are likely to be regulated in other ways, not least under general consumer protection legislation.

2. Many Costs Lawyers have established partnerships, limited liability partnerships, limited companies or other vehicles through which they work. Because the CLSB only regulates individuals and not organisations, these too are "unregulated employers".

3. This guidance is advisory; the CLSB has no direct regulatory reach over unregulated employers. However, the more control a Costs Lawyer has over their unregulated employer (for example, if they are a director or partner) the more we will hold that Costs Lawyer responsible for ensuring that the unregulated employer puts in place procedures that enable Costs Lawyers who work for the business to comply with the Code of Conduct and their other regulatory obligations.

4. Of course, a Costs Lawyer will always remain liable for their personal conduct within an unregulated employer. Where the practices or arrangements of an unregulated employer conflict with the regulatory obligations of a Costs Lawyer, then if the Costs Lawyer is unable to resolve that conflict it is likely that they will need to leave their employment.

5. It is therefore very important that you understand the professional obligations to which a Costs Lawyer is subject. Employers should not create an environment where a Costs Lawyer cannot comply with their obligations and should not

penalise a Costs Lawyer for complying with them. Contracts of employment should reflect the Costs Lawyers' professional obligations.

6. There is more detailed guidance on what many of these issues mean for Costs Lawyers in the rules and guidance set out in the Costs Lawyer Handbook.

Reserved legal activities

7. Under the LSA, certain legal activities are reserved to authorised persons, meaning that only qualified, regulated practitioners – such as Costs Lawyers – can undertake those activities.

8. Costs Lawyers are authorised to carry out the following reserved legal activities in unauthorised businesses:
   - conducting litigation in relation to costs;
   - appearing before and addressing a court (exercising a right of audience) in proceedings or on issues that relate to costs;
   - administering oaths.

   See our Guidance Note on reserved legal activity rights for more information.

9. The above reserved legal activities can be undertaken by a Costs Lawyer for the benefit of their unregulated employer. For example, a Costs Lawyer might work in a bank and conduct costs litigation on behalf of that bank. This is generally referred to as being an "in-house" Costs Lawyer, and the unregulated employer will be regarded as the Costs Lawyer's client for regulatory purposes. Alternatively, a Costs Lawyer can carry out the above reserved legal activities directly to or for the unregulated employer's external clients.

10. Costs Lawyers cannot delegate their right to carry on reserved legal activities to non-authorised members of staff, such as costs draftsmen. It is an offence under the LSA for anyone who is not authorised or not an exempt person (under Schedule 3 of the LSA) to carry on a reserved legal activity.

11. However, Costs Lawyers may, for example, bring a non-authorised person with them to court to take notes, and courts may also allow non-authorised persons to address them in certain hearings.

12. Costs Lawyers may also delegate ancillary tasks (such as preparing a draft of a document) to non-authorised persons, providing it is the Costs Lawyer who is conducting any litigation and, for example, approving and signing any documentation filed with the court.

13. A Costs Lawyer who chooses to delegate a task to a colleague remains responsible for regulatory compliance and for client outcomes. The Costs Lawyer must therefore retain proper oversight of the matter and supervise their colleague appropriately. This includes ensuring that:
    - delegated tasks are carried out in accordance with the CLSB's regulatory arrangements;
    - the client understands in advance that the task will be delegated to a person who is not an authorised Costs Lawyer;
    - the delegation complies with the Costs Lawyer Code of Conduct, in particular that delegating the task is in the client's best interests; and
    - the insurance policy upon which the Costs Lawyer relies extends to cover the outcome of any delegated tasks.

Some core obligations

14. Costs Lawyers are obliged to follow the seven principles of professional conduct set out in the Code of Conduct. They must:

    Principle 1: Act with honesty and integrity and maintain their independence.
    Principle 2: Comply with their duty to the court and promote the proper administration of justice.
    Principle 3: Act in the best interests of their client.
    Principle 4: Provide a good quality of work and service to their client.

Principle 5: Deal with the regulators and the Legal Ombudsman (LeO) in an open and co-operative way.
Principle 6: Treat everyone fairly and equitably, and with dignity and respect.
Principle 7: Keep the affairs of their clients confidential.

15. Under Principle 2, a Costs Lawyer's duty to the court means that (amongst other things) Costs Lawyers cannot mislead the court, or knowingly allow their clients or their employer to do so, even inadvertently.

16. Under Principle 5, Costs Lawyers have duties of disclosure to the CLSB. As an employer, you should be aware that Costs Lawyers might need to disclose matters relating to your work or business to us if they relate to compliance with our regulatory rules. Your contracts with Costs Lawyers should not prohibit disclosure by them of information in accordance with their professional obligations. Costs Lawyers also have duties of disclosure to LeO; these are dealt with below (see "Complaints about a Costs Lawyer").

17. Costs Lawyers are also required, under our Practising Rules and Continuing Professional Development (CPD) Rules in the Costs Lawyer Handbook, to maintain their knowledge and undertake ongoing training to ensure they remain competent to fulfil their role. As an employer, you should provide Costs Lawyers with the time and opportunity to maintain and build on their professional skills. While you are not obliged to pay for a Costs Lawyer's CPD training, you should keep in mind the benefits to your organisation and your clients of Costs Lawyers having access to high quality, relevant learning activities. You can read more about Costs Lawyers' CPD obligations in our Guidance Note on CPD.

Supervision

18. You should have an effective system of supervision in place within your organisation to help ensure that Costs Lawyers meet their own regulatory obligations when they are carrying out work, and that Costs Lawyers themselves supervise staff appropriately, as explained at paragraph 13 above.

19. An effective system of supervision is even more important if a large proportion of your staff are working at home for some or all of the time. This will include maintaining regular contact and checking work online where possible.

Requirements when the Costs Lawyer is providing services to external clients

20. When the Costs Lawyer is not purely "in-house", and is providing services to or for external clients, then there are additional obligations and considerations to take into account.

Professional indemnity insurance

21. Costs Lawyers are required to have professional indemnity insurance (PII) to cover claims against them for negligence.

22. Practising Rule 9 provides that they must:
    - have PII cover at a minimum level of £100,000 (for any one claim), to include loss of documents; and
    - on an ongoing basis, assess all financial risk associated with their work and ensure they have PII in excess of the minimum at a level commensurate with that risk.

23. The insurance policy will normally be in the name of the organisation. As an employer you should make sure that the policy meets the above conditions and covers all work undertaken by the Costs Lawyer, including any delegated work for which the Costs Lawyer is responsible. This will include a regular review of the financial risks to be insured – something that a prudent business will do in any event.

Client money

24. Costs Lawyers are not allowed to hold client money, pursuant to Principle 3.6 in the Code of Conduct. So, if as an unregulated employer you do hold money that

belongs to your clients, the relevant account should not be in a Costs Lawyer's name.

25. By client money we mean, for example, money:
    - from an opponent in contentious proceedings, to satisfy a costs award made in the client's favour;
    - from your client to satisfy a costs award made against that client; or
    - money paid in advance on account of charges for your services or disbursements such as court fees.

26. Costs Lawyers can however receive payment in their own name from clients in settlement of an invoice for services or for disbursements already incurred. They can also make use of a Third Party Managed Account (TPMA), whereby a reputable financial institution handles the client's money in a pre-agreed way.

27. Where an unregulated employer has its own legal identity (usually a limited company or LLP), then if any client money is held by that body it will not be held by the employed Costs Lawyer. In such cases, the prohibition in Principle 3.6 is not directly relevant. However, Costs Lawyers who work under this kind of arrangement still need to uphold their professional obligations, which will include safeguarding clients' money where relevant. See our Guidance Note on handling client money for further information.

Complaints about a Costs Lawyer

28. Under the Code of Conduct, a Costs Lawyer must provide for an effective complaints procedure for handling complaints from clients, covering issues relating to their professional conduct as well as the service they provide, in line with the CLSB's guidance on complaints procedures.

29. They must ensure that complaints are dealt with promptly (within a maximum eight-week period from date of receipt) openly and fairly, and that appropriate provisions for redress exist.

30. If a complaint is not resolved to the satisfaction of the complainant, or is not resolved within eight weeks, individual clients have the right to take a complaint about the standard of service provided by the Costs Lawyer to LeO. Complaints about a Costs Lawyer's professional conduct can also be considered by the CLSB. The Costs Lawyer must tell clients about the right to escalate a complaint to LeO or the CLSB both at the time of engagement and when any complaint is made, and provide contact details for those organisations.

31. If LeO upholds a complaint it has a range of options available to it, including ordering a Costs Lawyer to reduce a bill or to pay compensation. As well as looking at the substance of the complaint, LeO will look at the way in which the complaint was handled and this will be a factor in its determination, including whether to charge the Costs Lawyer the case fee for the matter.

32. If you do not already have one, your business will need to establish a complaints procedure that complies with these provisions as far as the work of the Costs Lawyer and any work that they supervise is concerned.

33. You should ensure that your employment contract with the Costs Lawyer permits them to disclose relevant information to LeO and the CLSB.

34. Issues may arise where a client complains about a matter where the Costs Lawyer did not perform all of the work and some of it was carried out by a non-authorised person such as a costs draftsman. LeO only has authority to deal with complaints in relation to authorised persons under the LSA. LeO may therefore decide to deal with only part of the complaint, or may decide to treat the whole case as the Costs Lawyer's responsibility where the Costs Lawyer was in charge of the matter or supervising the unqualified staff.

Information to clients

35. The Code of Conduct requires Costs Lawyers to ensure that clients are able to make informed decisions about the work being undertaken on their behalf throughout the lifetime of a matter, including how it will be priced, the costs

incurred and the likely overall cost of the matter (including any potential liability for the costs of other parties).

36. This means that a Costs Lawyer must give an estimate of fees and details of their charging structure to clients in advance of instruction. Where that estimate subsequently becomes inaccurate or that charging structure changes, the Costs Lawyer must provide an updated estimate or notice of revised charges.

37. The Costs Lawyer must also let the client know what steps will be taken in the matter and the likely timetable. For more detailed information, see our Guidance Notes on price transparency and client care letters.

38. Any publicity of your business must not be misleading or inaccurate insofar as it concerns the Costs Lawyer or their work.

39. It is important that clients are clear as to which work is going to be carried out by a Costs Lawyer and which work will be undertaken by staff who are not authorised under the LSA, and what the consequences are for the client. In particular:
    - Whilst the client will have a right to complain about the Costs Lawyer's service to LeO or about their conduct to the CLSB, they will have no such rights in relation to the unauthorised person.
    - Whilst professional indemnity insurance will be in place to cover any claim relating to the Costs Lawyer's work, that insurance might not extend to the work of unauthorised persons who are not supervised by the Costs Lawyer.

Conflicts of interest

40. A Costs Lawyer must decline to act if it would not be in the client's best interests to do so, including where that client's interests conflict with the Costs Lawyer's interests or with the interests of another client (other than in certain circumstances). See Principle 3.1a of the Code of Conduct and our Guidance Note on conflicts of interest.

41. Examples of such situations include:
    - Providing costs services to opposing parties in a costs dispute or other litigation.
    - Providing costs services to both an instructing solicitor and a third-party funder in negotiating funding terms for the same proceedings.

42. A Costs Lawyer must also decline to act for a client if the client has a conflict of interest with you, as the Costs Lawyer's employer, or with a fellow employee. This may mean, for example, that if the Costs Lawyer considers that a fellow employee at your firm has been negligent in relation to the client's case then the Costs Lawyer may be obliged to inform the client and to stop acting for them.

Confidentiality

43. Under Principle 7.1 of the Code of Conduct, a Costs Lawyer must keep the affairs of clients and former clients confidential unless disclosure is required or allowed by law or if the client consents in writing to disclosure, having had the consequences of such consent explained to them.

44. You will want to ensure as an employer that you have appropriate arrangements in place to help the Costs Lawyer meet their obligations in relation to confidentiality. This will also assist you in complying with the requirements of data protection legislation. For example:
    - Information should not be passed to third parties (for example, for marketing purposes) without the client's consent.
    - Personal data should not be used for a purpose other than for which it was supplied (for example, for cross-selling of services) without consent.
    - Client records should be held securely.

45. Confidential information regarding one client should not be shared with another.

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